RECENT DECISIONS.

ADMINISTRATIVE LAW—FINDING OF FACTS CONCLUSIVE. The petitioner alleged citizenship of the United States and unlawful detention by the immigration officer, who found that he was an alien, this decision having been affirmed by the Secretary of Commerce and Labor. *Held*, the finding by the administrative officers that the petitioner was an alien was conclusive and would not be reviewed on habeas corpus. *U. S.* v. *Ju Toy*, 25 Sup. Ct. 644. See NOTES, p. 537.

ADMINISTRATIVE LAW—OFFICERS—LIABILITY. In an action on a post master's bond conditioned on the performance of duties imposed by law or department rules, the rule in question being to keep separate registered matter "so as to be secure from accident or theft," it was *held*, the officer was liable irrespective of negligence for registered matter stolen from him. *U. S.* v. *Griswold* (Ariz. 1905) 80 Pac. 317.

Where a postmaster is a mere bailee he is liable only for due diligence, *U. S.* v. *Thomas* (1872) 15 Wall. 337, 343, but where, as in the principal case, the liability is on the bond, the officer is subject to the special obligation of the bond, as in the case of the receiver of public money; *U. S.* v. *Thomas*, supra; *U. S.* v. *Prescott* (1845) 3 How. 578; as to such officers the liability on the bond is absolute, *U. S.* v. *Dashiel* (1866) 4 Wall. 182; *Smythe* v. *U. S.* (1903) 188 U. S. 156, except in case of the act of God or the public enemy, *U. S.* v. *Thomas*, supra, which exception is strictly construed. *U. S.* v. *Keehler* (1869) 9 Wall. 83. The interpretation of the rule as commanding to keep safely seems correct. *U. S.* v. *Prescott*, supra.

ADMIRALTY—LIABILITY OF SHIP FOR UNAUTHORIZED TORT OF SEAMAN. An employee on defendant ship maliciously blew off latter's boiler so as to injure plaintiff's vessel. *Held*, the defendant ship was liable, although the seaman was not acting within the scope of his authority. *The Bulley* (1905) 138 Fed. 170.

American admiralty courts disregard the common law limitations on the doctrine of respondeat superior in torts, and permit an action in rem against the vessel for the unauthorized, willful acts of its crew. This conception, that the ship itself is the wrongdoer, originated in the commercial customs of the middle ages, *The China* (1868) 7 Wall. 53, 68, and in the efforts of the courts to insure indemnity to the injured party. *The U. S.* v. *Brig Malek Adhel* (1844) 2 How. 210, 233. The English decisions, however, more nearly approach the common law doctrine, Abbott on Shipping (6th Am. Ed.)* 228; Carver on Carriage by Sea, § 707, one case even holding that the liability of the ship and the responsibility of the owner are convertible terms. *The Druid* (1842) 1 W. Robinson 391, 399. The weight of American authority, however, favors the principal case. *Schooner Little Charles* (1818) 1 Brock. 347, 354.

CONFLICT OF LAWS—WRONGFUL DEATH STATUTE—PROPER PARTY TO SUE. By an Ohio statute a domestic personal representative was given a cause of action for wrongful death of the deceased for certain beneficiaries. A Kentucky personal representative, the proper party under the Kentucky wrongful death statute, sued in Kentucky under the Ohio statute for death in Ohio. *Held*, the suit was well brought, following *Stewart* v. *R. R. Co.* (1897) 168 U. S. 445. *Williams* v. *Camden Interstate Ry. Co.* (1904) 138 Fed. 571.

Where statutes merely remove common law disabilities, the right arising in one state may be given a remedy according to the procedure as to

parties in the other. *Halley* v. *Ball* (1872) 66 Ill. 250; *Stoneman* v. *Erie Ry. Co.* (1873) 52 N. Y. 429. But where the statute creates the right, as do the wrongful death statutes, Burdick on Torts, 233, the right seems properly construed to exist only as to the party named and no one else may enforce it. *Usher* v. *R. R. Co.* (1889) 126 Pa. 206; *R. R. Co.* v. *Lacy* (1873) 49 Ga. 106. Therefore while for purposes of jurisdiction a federal court may properly go behind the record parties to determine the real parties in interest, *Brown* v. *Strode* (1809) 5 Cranch 303; *McNutt* v. *Bland* (1844) 2 How. U. S. 9, it is clearly wrong to use the same procedure for the purpose of granting relief under a wrongful-death statute.

CARRIERS—INCEPTION OF THE RELATION OF CARRIER AND PASSENGER. The plaintiff entered the defendant's station and purchased a ticket, intending to take a train soon to arrive. *Held*, he had acquired the status of a passenger. *A., T. & S. F. Ry. Co.* v. *Holloway* (Kas. 1905) 80 Pac. 31.

The plaintiff, intending to become a passenger on the defendant's street car, signalled from a customary stopping place. The car slowed up in response. *Held*, an acceptance of the offer to become a passenger will be implied, and the plaintiff is a passenger while in the act of boarding the car. The relationship of passenger and carrier can be created only by contract. *Lewis* v. *Houston Electric Co.* (Tex. 1905) 88 S. W. 489.

That the relation of carrier and passenger arises before the traveller has boarded the car is well settled. In holding that such relationship can be created only by contract, the Texas decision follows *M., K. & T. Ry. Co.* v. *Williams* (1897) 91 Tex. 255. For the fallacy of this view and a general discussion of the question see 5 COLUMBIA LAW REVIEW 53.

CONSTITUTIONAL LAW—IMPAIRMENT OF OBLIGATION OF CONTRACT. Defendant under legislative command elevated its tracks from a cut in the street to an overhead structure. The legislative enactment provided no compensation for attendant damages to plaintiff's easements of light and air, although he had purchased his property subsequent to a decision of the highest state court declaring that such easements existed as property rights. *Held*, the Act was unconstitutional since it violated the obligation of a contract. *Muhlker* v. *Harlem Railroad Co.* (1905) 197 U. S. 544. See NOTES, p. 542.

CONSTITUTIONAL LAW—POLICE POWERS. Where a bill was filed to enjoin the collection of a fee, under a State statute providing that beer manufactured within or imported into the State and held there for sale should be first inspected, it was *held*, that such a statute was within the police power of the State; three justices dissented on the ground that as the inspection was inadequate, and the revenue derived therefrom was largely in excess of the cost, it was virtually an attempt to tax interstate commerce. *Pabst Co.* v. *Crenshaw* (1905) 25 Sup. Ct. 552.

Under *Brown* v. *Maryland* (1827) 12 Wheat. 419, federal control of interstate commerce is exclusive until a sale in the original package. By the Wilson Act (1890) 26 Stat. 313, c. 728, states have equal police powers over imported and domestic liquors. *In Re Rahrer* (1891) 140 U. S. 545. As, by its terms, the act affects only the exercise of the police power, the decision in *Brown* v. *Maryland*, supra, is, in other respects, still controlling; hence the validity of a statute will depend upon its purpose; if it was designed to tax interstate commerce it obviously is not a police measure; see *Postal Tel.* v. *Taylor* (1904) 192 U. S. 64; but if bona fide a police measure, the revenue, being ancillary to the purpose of the statute, is of no importance, however large it may be. Courts have always distinguished between the direct and indirect regulation of commerce by the state. 5 COLUMBIA LAW REVIEW 298.

CONTRACTS—BENEFICIAL ASSOCIATIONS—RESORT TO CIVIL COURTS. A by-law of a beneficial society provided that a member should not resort to the civil courts for redress until all means of appeal within the order were exhausted. *Held*, the by-law was not void as an attempt to oust the courts of jurisdiction. *McGuiness v. Court Elm City No. 1, F. O. A.* (Conn. 1905) 60 Atl. 1023.

The courts will not interfere with the internal affairs of benevolent societies unless property rights are involved, *Supreme Council O. C. F.* v. *Forsinger* (1890) 125 Ind. 52; *Goodman* v. *Jedidjah Lodge* (1887) 67 Md. 117, such, perhaps, as in benefit certificates. *Mulroy* v. *Knights of Honor* (1888) 28 Mo. App. 463. But except for extraordinary cases where great loss would be occasioned, cf. *Supreme Sitting Order I. H.* v. *Stein* (1889) 120 Ind. 270, the right of appeal within the society should be sustained, *Chamberlain* v. *Lincoln* (1880) 129 Mass. 70; *Jeane* v. *Grand Lodge A. O. U. W.* (1894) 86 Me.434. For discussion as to agreements to arbitrate, see 3 COLUMBIA LAW REVIEW, 418; 4 id. 600.

CONTRACTS—PUBLIC POLICY—EFFORTS TO SECURE LEGISLATION. Under a contract with defendant, the plaintiff publicly presented and argued certain matters before the Secretary of the Interior and Congressional Committees, thereby securing certain legislation. By the terms of the agreement, the plaintiff was to have ten per cent. of what the defendant saved by the legislation. On suit brought, the defendant pleaded the illegality of the contract. *Held*, distinguishing *Richardson* v. *Scotts Bluff Co.* (1899) 59 Neb. 400, the plaintiff should recover. *Stroemer* v. *Orsdel* (Neb. 1905) 103 N. W. 1053.

Such contracts are closely scrutinized by the courts. If they contemplate personal solicitation and sinister influence they will not be enforced; *Marshall* v. *Railroad Co.* (1853) 16 How. U. S. 314; *Clippenger* v. *Hepbaugh* (Pa.1843) 5 W.& S. 315; but if they stipulate for professional services, *Bary* v. *Capen* (1890) 151 Mass. 99, or for "drafting the petition . . . collecting facts, preparing arguments, and submitting them orally or in writing to a committee or other proper authority," they are enforceable. *Trist* v. *Child* (1874) 21 Wall. 441, 450; *Beal* v. *Polhemus* (1887) 67 Mich. 130; *Wood* v. *McCann* (Ky. 1838) 6 Dana 366; and see 3 COLUMBIA LAW REVIEW 281. The contingency of the fee does not per se render the contract void. *Sedgwick* v. *Stanton* (1856) 14 N. Y. 289; *Taylor* v. *Bemiss* (1883) 110 U. S. 42.

CRIMINAL LAW—CIRCUMSTANTIAL EVIDENCE OF CORPUS DELICTI. In a prosecution for murder, there was no direct evidence that the person alleged to have been murdered was in fact dead. *Held*, circumstantial evidence, if convincing beyond a reasonable doubt, is sufficient to prove the corpus delicti. *State* v. *Williams* (Ore. 1905) 80 Pac. 655.

The contention that the corpus delicti must be proved by direct evidence seems to have had its inception from a misinterpretation of a passage in 2 Hale P. C. 291, and the rule that the fact of death must be proved directly has been incorporated into the codes of at least two jurisdictions. N. Y. P. C. § 181; Tex. P. C. § 549. The difficulty of conviction under many conditions has, however, generally induced courts to repudiate the doctrine, 3 Wigmore Evidence § 2081; *U. S.* v. *Gibert* (1834) 2 Sumn. 19; *Comm.* v. *Williams* (1898) 171 Mass. 461, and to consider circumstantial evidence as sufficient, if the proof be "strong and cogent." 3 Greenleaf § 30. In *Ruloff* v. *People* (1858) 18 N. Y. 179, it was suggested that if either the death or the violence producing death were proved directly, circumstantial evidence of the other was sufficient. This rule, apparently not generally adopted, seems sufficiently to protect the defendant, and to render a conviction possible when the body can not be found, though it may seem

to draw an arbitrary distinction between the kinds of evidence required to prove the different elements of a crime.

CRIMINAL LAW—MURDER—PREMEDITATION. In a prosecution for murder in the first degree it appeared that the accused and others went armed to commit burglary. Some time after abandoning this purpose and starting back they encountered a policeman, who they thought intended to search them for concealed weapons. A melee ensued during which the defendant shot and killed the officer. *Held*, murder in the first degree. *People* v. *Woods* (Cal. 1905). 81 Pac. 652. See NOTES, p. 541.

EQUITY—INJUNCTION—RIGHTS OF STRIKERS AS TO PERSUASION OF NON-STRIKERS. An injunction granted against a trade union forbade, among other things, the "inducing or coercing by threats, intimidation, force, violence, or persuasion, any of the employees of the said complainant to leave the service or employment of said complainant; . . . going either singly or collectively to the homes of said employees of said complainant or any or either of them for the purpose of intimidating, coercing or persuading any or all of said employees to leave the employment or services of the complainant." The defendants had attempted so to influence complainant's employees, and defended, in contempt proceedings, by attacking the injunction. *Held*, the injunction was proper and the defendants were guilty of contempt. *O'Brien* v. *Kellogg Switchboard Co.* (Ill. 1905) 30 Nat. Corp. Rep. 774.

In thus considering mere persuasion as a wrong the court would seem to represent the most extreme view as to the control of labor unions. For a discussion and criticism of the principles underlying the decision see 1 COLUMBIA LAW REVIEW 123; 2 id. 37, 400, 552; 5 id. 239.

EVIDENCE—COMPULSORY PHYSICAL EXAMINATION. In an action for personal injuries, immediately prior to the trial, the defendant made application to the court for an order compelling the plaintiff to submit to a physical examination by physicians appointed by the court. *Held*, in the absence of legislation, the court had no power to make such an order. *May* v. *Northern Pacific Ry. Co.* (Mont. 1905) 81 Pac. 328. See NOTES, p. 539.

LANDLORD AND TENANT—CONSTRUCTIVE EVICTION. Defendant leased a room to plaintiff for saloon purposes. By a city ordinance a license could be obtained only with the consent of half the abutting property owners. The defendant owned other abutting lots, and refused his consent, thus defeating the plaintiff's petition for a license. *Held*, this was not an eviction. *Kellogg* v. *Lowe* (Wash. 1905) 80 Pac. 452.

An actual expulsion from leased premises is not necessary to constitute an eviction. *Royce* v. *Guggenheim* (1870) 106 Mass. 201. Any act of the landlord done with the intention and having the effect of depriving the tenant of the beneficial enjoyment of leased premises will amount to eviction. *Denison* v. *Ford* (N. Y. 1878) 7 Daly 384; 2 McAdam on Landlord and Tenant, § 404. Where premises were leased for a brewery and the landlord refused to give the written consent required by statute, the court found a constructive eviction; *Grabenhorst* v. *Nicodemus* (1875) 42 Md. 236. This doctrine seems more equitable and better founded in authority than that maintained in the principal case. *Silber* v. *Larkin* (1896) 94 Wis. 9; *Duff* v. *Hart* (1891) 16 N. Y. Supp. 163.

MASTER AND SERVANT—INJURY TO SERVANT WHEN IN COURSE OF EMPLOYMENT. A workman arrived on employer's premises twenty minutes before actual work began. He was injured through defective flooring while in the act of surrendering his time ticket. *Held*, accident arose out of and in the course of workman's employment. *Sharp* v. *Johnson & Co.* (1905) L. J. 74 K. B. D. 566.

That the relationship of master and servant may exist before actual beginning of the day's work has been established by the so-called "conveyance" cases, where the servant is carried to and from work in his master's conveyance. 3 COLUMBIA LAW REVIEW 49. The test is said to be the right of the employer to direct the servant at the particular time, place, and business. 5 COLUMBIA LAW REVIEW 403. In the principal case at the time of the accident the workman was complying with one of his employer's regulations, and so obviously was within the above rule. *Ewald* v. *R. R. Co.* (1888) 70 Wis. 420; *Boldt* v. *R. R. Co.* (1858) 18 N. Y. 432.

MUNICIPAL CORPORATIONS—IMPROVEMENTS—PATENTED MATERIALS. In a tax payer's suit to restrain the letting of a contract for paving because the advertisement called for a patented pavement, it was *held*, under a statute requiring the contract to be let to the lowest and best bidder, that the city had no power to specify patented material, although the patentee agreed to furnish it at a fixed price. *Monaghan* v. *Indianapolis* (Ind. 1905) 75 N. E. 33.

The jurisdictions divide on the question whether such contracts are consistent with a statute requiring competition. Similar considerations to those expressed in the principal case have led other courts to the same result. *Dean* v. *Charlton* (1869) 23 Wis. 590; *Nicolson Co.* v. *Painter* (1868) 35 Cal. 699; *Fishburn* v. *Chicago* (1898) 171 Ill. 339; *Verdin* v. *St. Louis* (1895) 131 Mo. 26; *State* v. *Elizabeth* (1872) 35 N. J. L. 351; *Burgess* v. *Jefferson* (1869) 21 La. An. 143. The opposing cases maintain that the necessary competition is present in the labor, and that the city should have the benefit of patented material if the best, *Hobart* v. *Detroit* (1868) 17 Mich. 246; *Matter of Dugro* (1872) 50 N. Y. 513, especially when it is procurable at a fixed price. *Hastings* v. *Columbus* (1885) 42 Ohio St. 585. In Wisconsin this limitation has been accepted where the improvements are not assessable. *Kilvington* v. *Superior* (1892) 83 Wis. 222. In several states such contracts have been authorized by statute, on petition of taxpayers. *State* v. *Elizabeth*, supra; *Nicolson* v. *Painter*, supra.

PERSONAL PROPERTY—INNKEEPER'S LIEN—PROPERTY OF ANOTHER IN POSSESSION OF GUEST. The plaintiff sold a piano to a guest in the defendant's hotel, the title until payment was completed to remain in the vendor, as also the right to immediate possession upon default as to any installment. Such default having occurred, the plaintiff's demand for the piano was refused by the defendant who claimed a lien thereon. In an action for the piano, it was *held*, the defendant acquired a lien on the piano as property brought by a guest. *Waters & Co.* v. *Gerard* (N. Y. 1905) 106 App. Div. 431.

An innkeeper has a lien on goods of a third party brought by a guest, *York* v. *Grenaugh* (1703) 2 Ld. Raym. 866; *Turrill* v. *Crawley* (1849) 13 Q. B. 197; *Kellogg* v. *Sweeney* (N. Y. 1869) 1 Lans. 397, even if the goods were tortiously taken, provided the innkeeper has no knowledge of the tort. *Johnson* v. *Hill* (1822) 3 Stark. 172. Some courts confine the lien to cases in which the innkeeper is ignorant as to the true ownership. *Broadwood* v. *Granara* (1854) 10 Ex. 417; *Singer Mfg. Co.* v. *Miller* (1893) 52 Minn. 516; *Cook* v. *Prentice* (1886) 13 Oregon 482. But if the innkeeper must receive all proper goods brought by the guest, irrespective of ownership, so creating a liability which gives rise to a co-extensive lien, *Robinson* v. *Walter* (1616) 3 Buls. 269 (but see *Threfall* v. *Borwick* (1875) L. R. 10 Q. B. 210), it would seem the knowledge of ownership is immaterial. *Robins & Co.* v. *Gray* [1895] 2 Q. B. 501. And see, *Manning* v. *Hollenbeck* (1870) 27 Wis. 202.

QUASI-CONTRACTS—RECOVERY FOR BENEFITS CONFERRED UNDER A CONTRACT. Where the plaintiff had contracted to put steam heaters in the defendant's house, and the house burned down before completion of the

work, it was *held*, that there was no cause of action. *Dame* v. *Woods* (N. H. 1905) 60 At. 744. See NOTES, p. 538.

QUASI-CONTRACTS—RECOVERY OF DEPOSITS UNDER A MARRIAGE BROKAGE CONTRACT. Where the plaintiff sued to recover £52 deposited with the defendant under an illegal marriage brokage contract, it was *held*, that the plaintiff had a cause of action. *Hermann* v. *Charlesworthy* [*1905*] *L. R. 2 K. B, (C. A.) 123.*

Equity has always been eager to relieve against marriage brokage bonds, *Arundel* v. *Trevellian* (1634) 1 Ch. Rep. 87; *Arleston* v. *Kent* (1620) Toth. 27; *Hall* v. *Potter* (1695) Shower 76; *Drury* v. *Hooke* (1686) 1 Vern. 412; *Gale* v. *Lindo* (1687) 1 Vern. 475; *Peyton* v. *Bladwell* (1684) 1 Vern. 240; *Turton* v. *Benson* (1718) 1 P. Wms. 496; *Roberts* v. *Roberts* (1730) 3 P. Wms. 66; and at an early date allowed a recovery for payments made under analogous contracts. *Goldsmith* v. *Bruning* (1700) 1 Eq. Cas. Abr. 89. As such contracts are considered illegal simply for the protection of the public, it follows that at law a recovery in quasi. contracts should be sustained upon the theory that the prohibition is aimed at the defendant alone. *Duval* v. *Wellman* (1891) 124 N. Y. 156; *contra White* v. *The Union* (1884) 76 Ala. 251; and see Scott's Cases on Quasi-Contract 669–681 *passim.*

QUASI-CONTRACTS—STATUTE OF FRAUDS—DEFENDANT IN DEFAULT. The plaintiff, under an oral agreement with the defendant, was to make certain improvements on defendant's land in return for which the defendant was to lease the premises to the plaintiff as long as they were for rent. The plaintiff performed and the defendant refused to execute the lease. The plaintiff sued in the common counts for the value of the improvements. *Held*, the plaintiff should recover. *Brashear* v. *Rabenstein* (1905) 80 Pac. 950.

Equity early decreed a recovery for benefits conferred against a defendant in default under a contract unenforceable because of the statute of frauds; *Anonymous* (1680) Freeman 486; *Hollis* v. *Edwards* (1683) 1 Vern. 159; and the rule is still followed. *Antony* v. *Leftwich* (1825) 3 Rand. 238; *Parkhurst* v. *Van Cortlandt* (1814) 1 John. Ch. 274. Since *Moses* v. *Macfarlane* (1760) 2 Burr. 1005, where Lord Mansfield placed on its feet the quasi-contractual remedy of money had and received [really a bill in equity in a common law court, *Straton* v. *Rastall* (1788) 2 T. R. 366] courts of law have consistently permitted a recovery on the common counts under the same state of facts. *Walker* v. *Constable* (1798) 1 B. & P. 306; *Gillet* v. *Maynard* (1809) 5 Johns. 85; *Cook* v. *Doggett* (1861) 2 Allen 439; *Taylor* v. *Reed* (1872) 19 Minn. 372.

REAL PROPERTY—DISCOVERY OF GOLD ON THE PUBLIC DOMAIN. The plaintiff, who was employed by the defendant as a laborer in excavating a site for the building of a quartzmill on public land, unearthed a natural pocket of gold which, against his will, the defendant claimed and appropriated. *Held*, the gold was the property of the plaintiff. *Burns* v. *Schoenfeld* (Cal, 1905) 81 Pac. 713.

A person appropriating public lands, either with or without a location or entry, for other purposes than mining, acquires, before patent granted, no title to the minerals in the land, as to which the land may still be regarded as public domain. *McClinton* v. *Bryden* (1855) 5 Cal. 97. A person discovering and appropriating metals or minerals on the public domain has absolute title to the material removed. U. S. Rev. S. 2319; *Forbes* v. *Gracey* (1876) 94 U. S. 762; *Johnston* v. *Harrington* (1892) 5 Wash. St. 73. As the plaintiff was not employed by the defendant to prospect, but to grade merely, the defendant could not bring his claim within the rule relating to finding by a servant in the course of employment. The plaintiff therefore was an original discoverer.

REAL PROPERTY—OWNERSHIP OF METEORITES. Defendant discovered on land of the plaintiff an irregularly shaped mass of iron supposed to be of meteoric origin, and without the knowledge or consent of the plaintiff appropriated it to his own use. In an action for the recovery of the meteorite, it was *held*, a meteorite is real property, and belongs to the owner of the soil upon which it falls. *Oregon Iron Company* v. *Hughes* (Or. 1905) 81 Pac. 572.

The classification of meteorites or aerolites is new to American law. Only one earlier case on the point has been found, and this held tbe meteorite was real property. *Goddard* v. *Winchell* (1892) 86 Iowa 71. It is said to have been so considered under civil law rules. 20 Alb. L. J. 299. The manner of attachment to the soil is certainly somewhat analogous to the growth of land by accretion in that both are the result of natural agencies, and therefore should go to the owner of the fee. 2 Bl. Com. 262. The result might well be the same if they are classed as chattels. They would then be analogous either to wild animals, and so normally belong to the owner of the fee, 5 COLUMBIA LAW REVIEW 241; or perhaps to objects washed up on the foreshore, which are held to belong to the owner of the foreshore. *Barker* v. *Bates* (Mass. 1832) 13 Pick. 255.

REAL PROPERTY—REPULSION OF SURFACE WATER. Where a railroad, running through the plaintiff's property, constructed an embankment which stopped the flow of surface water, backing it up for fifty feet over its own right of way, and then over the plaintiff's land, it was *held*, that the injury complained of was damnum absque injuria. *Clay* v. *Railway Co.* (Ind. 1905) 73 N. E. 904.

The court seems to assume that the water, backed up on the defendant's land, formed practically a wall on the boundary, thus effectively repelling the flow of any further surface water, and for such a repulsion there is at common law no redress; *Barkley* v. *Wilcox* (1881) 86 N. Y. 140; but as the flow of water, however sluggish, necessarily forced out upon the plaintiff's land some of the water already collected on the defendant's right of way, it would seem that a trespass was committed. 4 COLUMBIA LAW REVIEW 506; *contra Gannon* v. *Hargadon* (Mass., 1865) 10 Allen 106. This inevitable eddy might, however, be of such slight consequence that the court could well apply the maxim *de minimis non curat lex*. It is obvious, therefore, that under such an assumption each case must necessarily rest upon the physical characteristics of the land.

REAL PRORERTY—SHADE TREES IN THE STREET—RIGHTS OF ABUTTING OWNER. An abutting owner sued the defendant for destroying ornamental shade trees standing in front of his premises, but on land the fee to which was in the city. The trees had been planted by his predecessor in title with the permission of the city authorities; and the defendant had notice of the leakage from the mains of the gas which killed the trees. *Held*, the plaintiff had in the street a right in the nature of an easement, which extended to all parts of the street which enlarge the use and increase the value of the adjacent lot; and that his property right in the trees was sufficient to enable him to maintain this action. *Donahue* v. *Gas Co.* (1903) 181 N. Y. 313.

For comments on this case and a criticism of its holding after trial in the lower court, see 4 COLUMBIA LAW REVIEW 305.

TORTS—CONSTRUCTION OF RELEASE. Plaintiff was injured in a railway accident, and for thirty dollars signed a paper which recited certain specific injuries, and then released the defendant in general terms from "all claims, demands, damages and liabilities, of any and every kind or character whatsoever, for or on account of the injuries sustained . . . in the manner

or upon the occasion aforesaid, and arising or accruing, or hereafter arising or accruing in any way therefrom." The plaintiff now sues for injuries subsequently developing and unknown at the time of the release. *Held*, the general terms in the release are limited to the specified injuries in the recital, because the plaintiff being ignorant of the injuries cannot be said to have intended to release them. *Texas & Pacific Ry. Co.* v. *Dashiell* (1904) 25 Sup. Ct. 737.

The principle is well settled that general words in a release are limited by the specifications of the recital, 2 Rolle Ab. 409; *Thorpe* v. *Thorpe* (1697) 1 Ld. Raym. 235; *Jackson* v. *Stackhouse* (N. Y. 1823) 1 Cowen 122. *Railroad* v. *Artist* (1894) 60 Fed. 365. as the intention is taken to be to release only the claims recited. *Lumley* v. *Railway Co.* (1897) 76 Fed. 66. But it would seem a release as to injuries may reserve rights as to claims not mentioned or yet accrued. *Bliss* v. *Railway Co.* (1894) 160 Mass. 447. Under a general release containing no specific recital, the one releasing is held to take "the chances of future development," *Railway Co.* v. *McCarty* (1901) 94 Tex. 298, though such a release may be set aside in equity for fraud or mistake. *Blair* v. *Railway Co.* (1886) 89 Mo. 383. The principal case accords with the weight of authority; but see for an opposite holding, on a similar release, *Quebe* v. *Railway Co.* (Tex. 1904) 81 S. W. 20.

TORTS—NATURE OF RIGHT IN DEAD BODIES. Plaintiff shipped the dead body of her husband by the defendant railroad to the place of intended burial. Through the negligence of the railroad the coffin and body were injured. In an action for damages, *held*, that the plaintiff had an interest in the body which the court would recognize. *Louisville & U. R. R. Co.* v. *Wilson* (Ga. 1905) 51 S. E. 24. See NOTES, p. 543.

TORTS—VICARIOUS NEGLIGENCE. The plaintiff, an infant non sui juris, was injured while playing with dynamite. The jury found negligence on the part of the defendant upon whose premises the dynamite was obtained. It was conceded that the plaintiff's father was negligent in failing to watch the child after receiving knowledge of the danger. *Held*, the negligence of the father could not be imputed to the child. *Mattson* v. *Minn. & N. W. Ry. Co.* (Minn. 1905) 104 N. W. 443.

The doctrine of vicarious negligence, first propounded in the New York case, *Hartfield* v. *Roper* (1839) 21 Wend. 615, has since been recognized by several other jurisdictions. *Holly* v. *Light Co.* (Mass. 1857) 8 Gray 123; *Leslie* v. *Lewiston* (1873) 62 Me. 468; *Decker* v. *McSorley* (1901) 111 Wis. 91; *Railroad Co.* v. *Devore* (1902) 114 Fed. 155. The majority of the states, however, have either refused to accept the principle, *Robinson* v. *Cone* (1850) 22 Vt. 213; *Newman* v. *Railroad Co.* (1890) 52 N. J. L. 446; *Warren* v. *St. Ry. Co.* (1900) 70 N. H. 352; *Railroad Co.* v. *Snyder* (1868) 18 O. St. 399; *Bottoms* v. *Seaboard Ry.* (1894) 114 N. C. 699; *Railway Co.* v. *Moore* (1883) 59 Tex. 64, or have later repudiated it. *City of Evansville* v. *Senhenn* (1898) 151 Ind. 42; *Railway Co.* v. *Wilcox* (1891) 138 Ill. 370. The decision of the principal case, overruling *Fitzgerald* v. *Railway Co.* (1882) 29 Minn. 336, is interesting as it adds another state to the last named group, and illustrates the spread of general feeling against the New York doctrine. For a discussion and criticism of the underlying principle consult Beach, Contributory Negligence (1st Ed.) §38 et seq.

WILLS—EXECUTORY DEVISE OF PERSONAL PROPERTY. The testator devised the residue of his estate, real and personal, to his wife for life, and thereafter to the defendants. *Held*, the wife was entitled to the property during her life, and no trust of the personal estate arose. *Walker Ex'rs.* v. *Hill* (N. H. 1905) 60 At. 1017.

Executory devises of personal property after a life or other interest now seem everywhere protected. But the courts differ in the theory of protec-

tion. By the weight of anthority if the devise is of specific chattels, the first devisee has the custody and use for life, like a bailee, while the legal title is in the executory devisee. *Executors of Moffatt* v. *Strong* (N. Y. 1813) 10 Johns 11; *Vachel* v. *Vachel* (1669) 1 Ch. Cas. 129; *Burnett* v. *Roberts* (N. C. 1834) 4 Dev. L. 79, 81; *contra semble Horry* v. *Glover* (S. C. 1837) 2 Hill Eq. 515. If, however, the devise is of the residuary estate, as in the principal case, the general rule would seem to be that the property should be sold, the proceeds given to trustees to pay the income to the first devisee during life, and then the capital to the executory devisee, *Healey* v. *Toppan* (1864) 45 N. H. 243; *Howe* v. *Earl of Dartmouth* (1802) 7 Ves. 137, unless the will evinces a contrary intention. *Pickering* v. *Pickering* (1839) 4 Myl. & Cr. 289.